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Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099 and 97-1141

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In the Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., ET AL.,

Petitioners,

v.

IOWA UTILITIES BOARD, ET AL.,

Respondents.

AT&T CORP., ET AL.,

Petitioners,

v.

CALIFORNIA, ET AL.,

Respondents.

AND RELATED PETITIONS

On Writs Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF FOR CALIFORNIA

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission ("FCC") correctly concluded that in enacting the Telecommunications Act of 1996, Congress intended to grant the FCC exclusive jurisdiction to dictate to the States a prescribed methodology for determining the intrastate component of the prices that an incumbent local exchange carrier ("LEC") may charge competing LECs for access to the incumbent LEC's network, as well as other terms and conditions for the provision of such access.

2. Whether the FCC correctly concluded that in enacting the Telecommunications Act of 1996, Congress intended to grant the FCC exclusive jurisdiction to dictate to the States prescribed rules governing the provision of intraLATA dialing parity, a matter which is almost entirely intrastate in nature.

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STATEMENT OF CALIFORNIA

The People of the State of California and the Public Utilities Commission of the State of California (hereinafter collectively "California" or "CPUC") are the sole State parties that challenged both the FCC's *First Report and Order*[1] and its *Second Report and Order*[2] and hence are the sole State respondents who prevailed in both cases below. California, which initiated its transition to local telephone competition in 1993, has an immense interest in bringing fair and effective local competition to its 32 million citizens as soon as possible. With the support of the other participating States and the National Association of Regulatory Utility Commissioners, California files this separate brief on the merits in both cases because of its unique interest and perspective.

STATEMENT OF THE CASE

I. Background

A. The Communications Act of 1934 and the Dual Jurisdictional Scheme

Even before the enactment of the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, it was well established that the States had exclusive jurisdiction over intrastate telecommunications. In *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148-149 (1930), for example, this Court made clear that the provision of telephone service is a matter having both intrastate and interstate components and that the intrastate component, a matter of primarily local concern, was subject to

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[1] 11 FCC Rcd 15499 (1996); J.A. 403-1160.

[2] 11 FCC Rcd 19392 (1996); J.A. 1161-1357.

exclusive State regulation. This had long been the rule with respect to matters subject in part to interstate regulation under the Interstate Commerce Act. *See, e.g., Minnesota Rate Cases*, 230 U.S. 352, 420, 423 (1912).

Thereafter, in 1934, when Congress enacted the Communications Act and transferred telephone regulation from the Interstate Commerce Commission to the newly created Federal Communications Commission, it was careful to ensure that the dual jurisdictional principle of *Smith v. Illinois* applied. Congress created a system of dual regulation through § 2 of the Act, 47 U.S.C. § 152, which granted the FCC jurisdiction over interstate communications, *see* § 2(a) of the Act, 47 U.S.C. § 152(a),[3] while leaving the States exclusive jurisdiction over intrastate matters, *see* § 2(b) of the Act, 47 U.S.C. § 152(b), App. A1.[4]

Section 2(b) provides in relevant part: "[N]othing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." By § 2(b)'s express terms, neither the FCC's general jurisdiction over interstate communications, 47 U.S.C.

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[3] The FCC's jurisdiction over "interstate" matters did not extend to communications crossing State lines if the communications were "between points . . . in the same State" and "regulated by a State commission." 47 U.S.C. § 153(22), App. A2. Nor did the FCC's jurisdiction extend to *local* calls crossing State lines if regulated "by a State commission." 47 U.S.C. § 221(b), App. A3.

[4] As herein used "J.A." refers to the deferred joint appendix, "Pet. App." refers to the petitioners' appendix, and "App." refers to the appendix to this brief.

§ 152(a), nor its general responsibility for ensuring an efficient national communications system, 47 U.S.C. § 151, may be used to override the jurisdiction over intrastate communications reserved to the States by Congress. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369-70 (1986).

In addition, to facilitate the FCC's compliance with § 2(b), the 1934 Act authorized (and, under the *Smith* doctrine, *required*) the FCC to engage in the jurisdictional separation of the interstate and intrastate components of the cost of wire telephone toll service by enacting 47 U.S.C. § 221(c), App. A4.[5] Ch. 652, Title II, § 221, 48 Stat. 1080 (June 19, 1934). Thereafter, in 1971, Congress amended the 1934 Act by adding 47 U.S.C. § 410(c), App. A13, Pub. L. 92-131, § 2, 85 Stat. 363 (Sept. 30, 1971), establishing a Federal-State Joint Board procedure to further facilitate the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations in order to facilitate interstate and intrastate ratemaking. The dual jurisdictional scheme and the separations process facilitating it have continuously remained in effect to the present day. *See, e.g., Louisiana*, 476 U.S. at 375-376; *Crockett Telephone Co. v. FCC*, 963 F.2d 1564, 1566-67, 1571 (D.C. Cir. 1992); *NARUC v. FCC*, 737 F.2d 1095, 1103-05 (D.C. Cir. 1984).

B. The AT&T Divestiture

By the early 1970s, regulatory policy in the field of telecommunications had begun to shift, in large part because

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[5] As noted, jurisdiction over *local* service, whether intrastate or interstate, was assigned exclusively to the States under § 221(b), App. A3-A4.

regulators recognized that evolving technologies had created opportunities to harness the benefits of competition for consumers. In 1982, the United States Department of Justice and AT&T entered into a consent decree under which AT&T was required to divest itself of the 22 then-existent Bell Operating Companies ("BOCs"). *United States v. AT&T*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd mem.*, 460 U.S. 1001 (1983); *see also* 47 U.S.C. §§ 153(3), 153(4). Under the decree, which was known as the "Modification of Final Judgment" or "MFJ," seven regional holding companies, known as the "RBOCs," were formed.

The MFJ created a new geographic unit for the provision of local telephone service, the "Local Access and Transport Area" or "LATA." *See generally* 47 U.S.C. § 153(25), App. A2; *United States v. Western Electric Co.*, 569 F.Supp. 990 (D.D.C. 1983). Under the MFJ, a BOC was allowed to transport calls between telephones within a single LATA – which was called "intraLATA" service – but not between telephones in two different LATAs – which was called "interLATA" service. 47 U.S.C. § 153(21), App. A2. Only an interexchange carrier – and not a BOC – was permitted to carry calls across LATA boundaries. There are now 163 LATAs nationally, and the vast majority of them are situated within the boundaries of a single State.

Virtually all intraLATA calls originating in California and in the United States are intrastate calls and hence subject to exclusive State jurisdiction. The percentage of intraLATA calls originating in California that cross State lines is "miniscule and so small as not to be statistically significant." *California v. FCC*, Eighth Cir. No. 96-3519, California Brief, at 6 n. 2. Nationally, the percentage of intraLATA calls that are interstate is similarly miniscule: "a small fraction of one per

cent" and "so inconsequential as to be *de minimis*." *Id.*, at 7 n. 3; *California v. FCC*, Eighth Cir. No. 96-3519, California Reply Brief, at 3 n. 5. Petitioners have never disputed these statements. *Id.* Nor have they disputed California's representations at oral argument before the Eighth Circuit and in its Brief in Opposition in this Court that only two out of every thousand (.002) intraLATA calls made in the United States are interstate calls. *See, e.g.*, California Brief in Opp., at 3 n. 7. Furthermore, to the extent there *are* intraLATA, interstate telephone calls made in this country, most of *those* calls fall within the jurisdiction of the originating State in any event under 47 U.S.C. § 221(b), App. A3-A4.

Because the percentage of intraLATA calls that are interstate is so small, the FCC does not bother to break down its statistics for intraLATA calls into intrastate and interstate components, although it does so for interLATA calls. *See Statistics of Communications Common Carriers*, Table 2.6, p. 24 (FCC, 1996). Moreover, the FCC has acknowledged as recently as 1994 that most intraLATA calls "are intrastate and not within our purview." *Notice of Proposed Rulemaking* ("*NPRM*"), *Administration of the North American Numbering Plan*, 9 FCC Rcd 2068, 2077 n. 93 (1994).[6]

It is also notable that in other contexts, the FCC has ruled under its jurisdictional separations procedures, 47 U.S.C.

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[6] It is also notable that some 92 per cent of *all* telephone calls originating in California are intrastate in nature. *Statistics of Communications Common Carriers* (FCC, 1996), at 24. Remarkably, in 1995 there were significantly more intrastate telephone calls made in California (70+ billion) than there were interstate telephone calls made in the entire United States (50+ billion)! *Id.* Thus the FCC's usurping State authority over intrastate telecommunications leaves a very thin interstate tail wagging a very substantial intrastate dog.

§§ 221(c) and 410(c), App. A4, A13, that the federal interest in regulating service which involves less than 10 per cent interstate traffic is *de minimis* and not subject to FCC authority. *See Decision and Order, In the Matter of MTS and WATS Market Structure*, 4 FCC Rcd 5660 (1989), *adopting Recommended Decision and Order*, 4 FCC Rcd 1352 (1989).

IntraLATA telephone calls can be either "local" calls or "toll" calls. IntraLATA calls that remain within the caller's local calling area – the area in which local exchange calls are made without additional charge beyond the flat monthly rate – are "local" calls. IntraLATA calls that are completed outside the caller's local calling area, and for which a premium charge is assessed, are "toll" calls. 47 U.S.C. § 153(48), App. A3. However, neither the AT&T divestiture nor the creation of LATAs under the MFJ in any way affected the dual jurisdictional scheme established by Congress. Indeed, the MFJ court repeatedly acknowledged that under the decree, the States retained authority over both intraLATA and intrastate service. *United States v. Western Electric Co., supra*, 569 F.Supp. at 1005; *see also United States v. Western Electric Co.*, 569 F.Supp. 1057, 1109 (D.D.C.), *aff'd mem. sub nom. California v. United States*, 464 U.S. 1013 (1983). Since the AT&T divestiture, the States have continued to regulate intrastate service – whether the *intrastate* calls involved are intraLATA local calls, intraLATA toll calls or interLATA toll calls – while the FCC has continued to regulate interstate interLATA (long distance) service, as well as the miniscule realm of interstate intraLATA toll service. 47 U.S.C. §§ 152, 153(22), 221(b), App. A1, A2, A3-A4.

Following the AT&T divestiture, most States granted an exclusive monopoly franchise to a single carrier in each local

exchange area for the provision of local and intrastate intra-LATA toll service. These companies are called local exchange carriers or "LECs." 47 U.S.C. § 153(26), App. A3. While not required to do so, a number of States have in recent years chosen to introduce competition into the provision of intrastate telephone service. California is among those States. *See, e.g., Decision 94-09-065, Re Alternative Regulatory Frameworks for Local Exchange Carriers*, 56 Cal.P.U.C.2d 117, 141 (1994).

C. The Telecommunications Act of 1996

In 1996, Congress enacted the Telecommunications Act of 1996[7] to open all telecommunications markets, including local markets, to competition. The Act established a set of duties with which incumbent LECs were required to comply and identified the functions, features and services that incumbent LECs were required to make available to competing LECs, as well as the mutual duties of carriers to each other. 47 U.S.C. § 251, App. A4-A9.[8] The duties imposed upon the incumbent LECs included the duties to interconnect with competitors (47 U.S.C. § 251(c)(2), App. A6) and to provide access to unbundled network elements (47 U.S.C. § 251(c)(3), App. A6) at "just and reasonable" rates "based on . . . cost" as determined by a State commission (47 U.S.C. § 252(d)(1), App. A10), and the duty to resell telecommunications services

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[7] Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996), *codified in part at and amending* the Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.*

[8] Unless otherwise specified, statutory references are to the 1934 Act, as amended by the 1996 Act.

(47 U.S.C. § 251(c)(4), App. A7) at wholesale rates as determined by a State commission (47 U.S.C. § 252(d)(3), App. A11).

The Act authorized carriers to negotiate agreements relating to the terms and conditions upon which interconnection, the purchase of unbundled network elements and resale would occur in order to allow a competing carrier access to the incumbent's network. 47 U.S.C. § 252. To the extent that such negotiations were unsuccessful, it authorized State commissions to arbitrate and resolve disputes, and it permitted aggrieved carriers to appeal State commission determinations to Federal district courts. *Id.* Only if a State commission failed to carry out its responsibility under § 252 was the FCC empowered to "assume the responsibility of the State commission. . . . " 47 U.S.C. § 252(e)(5).

The duties imposed on incumbent LECs also included the duty "to provide dialing parity to competing providers of telephone exchange service and telephone toll service." 47 U.S.C. § 251(b)(3), App. A5. The term "dialing parity" means that a competitor of a LEC can provide telecommunications services in a way that allows the caller to route the call automatically, without dialing extra digits, to the designated carrier of the caller's choice from among 2 or more carriers (including the LEC). *See* 47 U.S.C. § 153(15), App. A1.

By its terms, § 251(b)(3) addresses the duty of carriers to provide *intraLATA* dialing parity, not *interLATA* dialing parity. The provision of interLATA, or long distance, dialing parity was accomplished pursuant to rules established and enforced more than a decade ago following the AT&T divestiture by the MFJ court, the FCC and the States. In 1984, the MFJ required dialing parity for interLATA calls by requiring

that customers of the BOCs be permitted to preselect a competing interexchange carrier to carry their interLATA calls and to route calls to that carrier's network simply by dialing "1" plus the called party's telephone number. *United States v. AT&T*, *supra*, 552 F.Supp. at 233. GTE, a large LEC that was not one of the BOCs, was subject to a similar dialing parity or "equal access" requirement imposed by consent decree. *United States v. GTE Corp.*, 603 F.Supp. 730 (D.D.C. 1984). And other LECs have generally been required to follow this dialing parity model for interLATA calls by the States and the FCC. *See, e.g., NPRM, Administration of the North American Numbering Plan, supra*, 9 FCC Rcd at 2077, ¶ 55. Since dialing parity issues related to interLATA calls were long ago resolved under the so-called "1 plus" framework, the dialing parity issue in this case is whether the FCC's establishment of dialing parity standards and related requirements for intraLATA calls in the *Second Report and Order* impermissibly intrudes on legitimate State authority over intrastate telecommunications. As above noted, virtually all intraLATA calls made in California and across the nation are intrastate calls. Moreover, dialing parity only involves the *origination* of telephone calls, not the receipt or termination of calls, and hence as a practical matter only implicates the regulatory regime applicable in the originating State.

A few narrow provisions of the Act expressly gave the FCC authority over matters having intrastate aspects (*see, e.g.*, 47 U.S.C. § 251(b)(2), App. A5, granting the FCC jurisdiction over number portability and numbering administration), while other provisions arguably gave the States jurisdiction over matters having interstate aspects (*see, e.g.*, 47 U.S.C. § 251(b)(4), App. A5, granting the States jurisdiction over access to poles, ducts, conduits and rights-of-way). By

and large, however, the 1996 Act did not fundamentally alter the dual State/Federal jurisdictional scheme established by Section 2(b) of the 1934 Act, 47 U.S.C. § 152(b), App. A1. By leaving § 2(b) intact when it passed the 1996 Act (with narrow and limited exceptions), Congress preserved the FCC's broad authority over "interstate" matters but also continued to fence off from FCC reach and regulation "intrastate" matters which fall within the exclusive authority of the States. Indeed, early versions of the Act would have excepted the local competition portions of the Act from the reach of § 2(b), but the final version of the Act omitted the exception. As the Court has noted: "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983).

Moreover, Congress further reinforced § 2(b) and the dual jurisdictional scheme by enacting the savings provision of § 601(c)(1) of the 1996 Act, App. A14, Pub. L. 104-104, Title VI, § 601(c)(1), 110 Stat. 143 (Feb. 8, 1996) (enacted but not codified), which clarified that neither § 2(b) nor any provision of State law was altered by the Act unless the Act did so *expressly*. Section 601(c)(1) states:

> (c) Federal, State and Local Law. –
>
> (1) No implied effect. – This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

II. The Decisions Below

A. The First Report and Order and Pricing

With the enactment of the new law, the FCC saw opportunity. It issued its epic *First Report and Order* and implementing regulations which tore asunder the dual jurisdictional scheme wrought by Congress by asserting FCC jurisdiction over intrastate matters which Congress reserved to the States, dictated a single methodology for the intrastate pricing of local competition services nationally which it required the States to employ,[9] deputized the States to carry out its policies, and appointed itself the court of review of all State actions.[10]

The FCC took these actions despite provisions in the 1996 Act which plainly gave authority over pricing determinations to the States. For example, § 252(d), entitled "Pricing standards," provides that "[d]eterminations *by a State commission* of the just and reasonable rate" for interconnection and for network elements shall be based on cost (emphasis added). App. A10-A11. Similarly, § 252(c)(2) provides: "In resolving by arbitration . . . any open issues and imposing conditions upon the parties to the agreement, *a State commission* shall . . . establish any rates for interconnection, services, or network elements . . . " (emphasis added). App. A10. And § 252(d)(3) provides that "*a State commission* shall determine wholesale rates on the basis of retail rates . . . "

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[9] It did so despite significant differences in evolving local markets and network investment, and in derogation of proceedings in numerous States, including California, which had begun the process of transitioning to local telephone competition years before the 1996 Act was conceived.

[10] *First Report and Order*, ¶¶ 126-128; J.A. 468-469.

(emphasis added). App. A11. These provisions manifestly confer pricing authority on the States, not the FCC, subject only to the standards set forth in the Act.

The FCC's exercise of jurisdiction over intrastate matters was also taken in derogation of § 2(b) and the dual jurisdictional scheme, *see Louisiana, supra*, 476 U.S. at 370, even though the FCC candidly acknowledged in its order that the pricing provisions of §§ 251 and 252 "do not contain an explicit grant of intrastate authority to the Commission" – the necessary predicate to override § 2(b). *First Report and Order*, ¶ 84; J.A. 448.

B. The Second Report and Order and Dialing Parity

On the same day it issued the *First Report and Order*, the FCC issued its similarly lengthy *Second Report and Order* which arrogated to itself the power to dictate to the States the rules and standards for intraLATA dialing parity, even though almost every telephone call in the United States which is subject to those rules and standards is intrastate in nature.[11] In the *Second Report and Order*, the FCC asserted jurisdiction over policies and regulations relating to the provision by LECs of intrastate dialing parity. In making that jurisdictional

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[11] The rules for interLATA or long distance dialing parity were established more than a decade ago following the AT&T divestiture, leaving the sole question the appropriate dialing parity rules for intraLATA calls (both local and toll). It was undisputed below that *no* measurable percentage of intraLATA calls (local and toll) associated with California LATAs is interstate in nature, and that nationally .002, or approximately 2 out of every 1000 intraLATA calls (local and toll), are interstate in nature. Moreover, a scant two per cent of intraLATA *toll* calls are interstate in nature.

determination and adopting regulations to implement intrastate dialing parity under 47 U.S.C. § 251(b)(3), App. A5, the FCC merely *assumed* it possessed such authority and failed to address § 2(b) and the several provisions of the 1996 Act which confirm that the States retain jurisdiction over intrastate dialing parity.

More specifically, the FCC purported to "delegate" a modicum of authority to the States over intrastate dialing parity for the time being. Nevertheless, it dictated a "minimum" presubscription standard for intraLATA or intrastate toll dialing parity – the so-called "full 2-PIC method"[12] – which according to the *Second Report and Order* is the *only* permissible method of presubscription that is currently technically feasible. *Second Report and Order*, ¶¶ 5, 37, 49, J.A. 1169, 1183, 1188; 47 C.F.R. § 51.209, Pet. App. 348a. The FCC therefore effectively dictated that States adopt the "full 2-PIC method" *only*, even though the so-called "modified 2-PIC method," which they prohibit, satisfies the definition of "dialing parity" contained in the 1996 Act. 47 U.S.C. § 153(15), App. A1.

The FCC also prohibited a State from establishing an interim default mechanism by which a LEC could assign itself as the intraLATA toll service provider of a new LEC customer who does not affirmatively choose an intraLATA toll service provider, thus requiring the customer to dial a carrier access code for each intraLATA toll call or intrastate toll call until

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[12] The "full 2-PIC method" requires that a customer be allowed to select two presubscribed carriers (in addition to its LEC), one for intraLATA toll calls and another for interLATA calls. A "modified 2-PIC method" would permit the customer to choose an intraLATA toll service provider from among the LEC and the interLATA service provider.

the customer makes a permanent, affirmative selection. *Second Report and Order*, ¶ 78, J.A. 1203; 47 C.F.R. § 51.209(c), Pet. App. 349a. It required carriers to develop and submit detailed implementation plans and imposed on States and carriers an implementation schedule, the violation of which would purportedly result in the FCC's taking control from the States of the entire intrastate and intraLATA dialing parity implementation process. *Second Report and Order*, ¶¶ 38, 59, J.A. 1183-1184, 1193; 47 C.F.R. §§ 51.211, 51.213, Pet. App. 349a-353a.

While the FCC considered implementing local dialing parity requirements and methodologies, *see Second Report and Order*, ¶¶ 64-75, J.A. 1196-1202, it concluded that "local dialing parity will be achieved upon implementation of the number portability and interconnection requirements of section 251" and therefore "decline[d] to prescribe now any additional guidelines addressing the methods that LECs may use to accomplish local dialing parity." *Id.* at ¶ 71, J.A. 1199. However, its discussion of local dialing parity did not preclude it from imposing local dialing parity requirements at some future date nor did it address the fact that the Act leaves local calls, whether intrastate or interstate, subject to exclusive State jurisdiction. 47 U.S.C. § 221(b), App. A3-A4. Finally, the FCC established "national" rules for a LEC's recovering the costs incurred in implementing the dialing parity requirements. *Second Report and Order*, ¶¶ 92-95, J.A. 1209-1211; 47 C.F.R. § 51.215, Pet. App. 353a.

In exercising jurisdiction over intraLATA and intrastate dialing parity, the FCC nevertheless expressly acknowledged that the regulation of dialing parity is separable into intraLATA and interLATA components or, alternatively, into intrastate and interstate components. *Second Report and Order*,

¶ 37, J.A. 1183. The FCC also acknowledged that § 251(g), App. A9, which preserves the equal access obligations of the BOCs under the MFJ, has nothing to do with the FCC's dialing parity requirements imposed under § 251(b)(3), App. A3-A4. The FCC said: "That section [251(g)] contains no reference or cross reference to dialing parity or to section 251(b)(3). Section 251(g) preserves the equal access obligations already imposed on the BOCs and GTE, but does not exempt them from the toll dialing parity requirements." *Second Report and Order*, ¶ 29, J.A. 1178-1179. And, as above noted, the equal access obligations of the BOCs under the MFJ do not include intraLATA dialing parity. *United States v. Western Electric Co., supra*, 569 F.Supp. at 1005; *United States v. Western Electric Co., supra*, 569 F.Supp. at 1109.

C. The Eighth Circuit's Decisions

The FCC's actions spawned a flurry of petitions for review from State commissions and carriers. All told, thirty-three States,[13] along with many other parties, challenged the FCC's opportunistic seizure of pricing authority in the United States Court of Appeals for the Eighth Circuit. Some sought a partial stay of the FCC's pricing rules pending decision on the merits, and the Eighth Circuit granted the stay. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996), J.A. 224-242. On motions to vacate the stay filed by the petitioners herein, this Court unanimously declined to disturb the ruling, rejecting petitioners' claims that there was a "reasonable probability"

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[13] This number includes State parties who participated in the motion to enforce the Eighth Circuit's mandate following its *Iowa Utils. Bd.* decision.

that four members of the Court would vote to grant certiorari, a "significant possibility" of reversal of the Eighth Circuit's decision and "a likelihood" of irreparable harm arising from the decision. *See FCC v. Iowa Utils. Bd.*, 117 S. Ct. 378 (No. A-299 Oct. 31, 1996) (Thomas, J., in chambers), 117 S. Ct. 429 (No. A-299 Nov. 12, 1996) (per curiam). In addition, California and several carriers, along with a host of supporting intervenors, challenged the FCC's opportunistic seizure of intraLATA dialing parity jurisdiction.

After full briefing and argument, the Eighth Circuit rendered its final decision in the pricing case, fully consistent with its earlier stay ruling, vacating the pricing regulations contained in the *First Report and Order* and associated FCC regulations. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), Pet. App. 1a-67a. The Eighth Circuit also rendered its final decision in the dialing parity jurisdiction case, vacating the dialing parity regulations contained in the *Second Report and Order* and associated FCC regulations. *California v. FCC*, 124 F.3d 934 (8th Cir. 1997), Pet. App. 73a-91a.

These proceedings on writs of certiorari follow.

SUMMARY OF ARGUMENT

In enacting the Telecommunications Act of 1996, Congress did not grant the FCC exclusive jurisdiction to dictate to the States a prescribed methodology for determining the prices that an incumbent LEC may charge competing LECs for access to the incumbent LEC's network. Nor did it grant the FCC exclusive jurisdiction to dictate other terms and conditions for the provision of such access. Instead, Congress straightforwardly and unambiguously assigned to the States exclusive authority, subject only to the standards contained in

the Act itself, to determine the prices and pricing methodologies, and the other terms and conditions, under which an incumbent LEC must provide a competing LEC with access to the incumbent LEC's local network. *See* 47 U.S.C. §§ 252(c)(2), 252(d) and 252(d)(3), App. A10-A11. Section 251(d)(1) of the Act, the primary provision relied on by the FCC, is merely a procedural statute and does not constitute a straightforward and unambiguous grant of authority to the FCC to implement the matters addressed in § 251. Nor does the FCC derive support for its position from §§ 154(i), 201(b), 251(d)(2), 251(d)(3) or 303(r), none of which unambiguously grants the FCC the authority it seeks.

In addition, § 2(b) of the Act, 47 U.S.C. § 152(b), App. A1, fences off from FCC reach and regulation intrastate matters. *Louisiana, supra*, 476 U.S. at 370. Since Congress expressed no clear intent to grant the FCC authority over pricing and the other terms and conditions under which a LEC provides competitors with access to its local network – a fact the FCC concedes – the dual jurisdictional scheme remains intact with respect to such matters. Moreover, both the legislative history of the 1996 Act and the savings clause of § 601(c)(1) of the Act, App. A14, make manifest that Congress intended § 2(b) to apply to pricing and related matters. Accordingly, the States, not the FCC, have jurisdiction over the intrastate aspects of those matters.

The principle of *Chevron* deference (*Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984)), is inapplicable to this case. If the 1996 Act *expressly* grants either the States or the FCC exclusive jurisdiction over pricing and related matters, the principle of *Chevron* deference is inapplicable because "the intent of Congress is clear." *Chevron*, 467 U.S. at 842. If, however, the 1996 Act does not *expressly* grant exclusive

jurisdiction over pricing and related matters either to the States or to the FCC, *Chevron* is still inapplicable because the two mandatory rules of statutory construction contained in §§ 2(b) and 601(c)(1) of the Act, App. A1, A14, supersede the judge-made principle of *Chevron* in the circumstances presented.

Those provisions also preclude the construction of the statute advocated by the FCC. The FCC concedes as much when it acknowledges that §§ 251 and 252 "do not contain an explicit grant of intrastate authority to the Commission." *First Report and Order*, ¶ 84; J.A. 448. This Court has held that under § 2(b), the absence of such an explicit grant of authority precludes Federal preemption. *Louisiana, supra*, 476 U.S. at 368-69, 377. Moreover, in addition to §§ 2(b) and 601(c)(1), Congress left intact the jurisdictional separations requirements of 47 U.S.C. §§ 221(c) and 410(c), App. A4, A13, thereby further demonstrating its intent that the dual jurisdictional scheme be applicable to the amended statute. *Id.* at 375-376.

The FCC's argument that § 2(b) "cannot logically be construed to mean that [it] limits the scope of the Commission's authority *more* than it limits the substantive reach of federal telecommunications law" is similarly without merit. *See* FCC Brief, at 34. That argument is contrary to the plain language of § 2(b) and the purpose of § 2(b) as articulated by this Court – to "fence off from FCC reach or regulation intrastate matters – indeed, including matters 'in connection with' intrastate service." *Louisiana, supra*, 476 U.S. at 370. The argument is also inconsistent with the canons of construction that statutory terms connected by a disjunctive be given separate meanings and that a statute not be construed to render a portion of its text mere surplusage.

The FCC's argument that "[s]ection 2(b) . . . [was] intended to bar the Commission from exercising its 'ancillary' jurisdiction . . . over intrastate matters . . . to which the Act itself does not clearly extend" is unpersuasive. FCC Brief, at 34, *citing Louisiana* and *Houston, E. & W. Texas Ry. v. United States*, 234 U.S. 342 (1914) (*Shreveport Rate Case*). *Louisiana* nowhere refers to the FCC's ancillary jurisdiction and broadly refutes the argument that § 2(b) is subject to a narrowing construction because one of Congress' purposes in enacting § 2(b) was to legislatively overrule *Shreveport*. 476 U.S. at 370, 372-373. Congress' affirmative retention of § 2(b) and the broad construction of that section in *Louisiana*, of which Congress must be presumed to have been aware, strongly suggests the contrary. Finally, the FCC's construction would create a slippery slope, leaving the States without any role at all in the transition to local competition.

The FCC's reliance on the so-called "impossibility" exception to § 2(b), *see Louisiana*, 476 U.S. at 375-376 n. 4, is also misplaced. Not only was that doctrine *not* a stated basis for the FCC's decisions below, *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1943), but it is flatly refuted by the other FCC and court decisions which have found that the dual jurisdictional scheme applies to the prices or rates charged by LECs for "access," "unbundled access" and "interconnection" to the local network. *MTS & WATS Market Structure: Third Report and Order*, 93 F.C.C.2d 241, 260-265 (1983), *aff'd*, *NARUC v. FCC, supra*, 737 F.2d 1095, 1114, 1115 (LEC intrastate access charges to interexchange carriers subject to dual jurisdictional scheme); *ONA Reconsideration Order*, 5 FCC Rcd 3084, 3088-3090, 3100 n. 111 (1990), *reversed on other grounds*, *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (LEC unbundled basic service element charges to enhanced

service providers subject to dual jurisdictional scheme); *In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 2 FCC Rcd 2910 (1987) (LEC interconnection charges to cellular carriers subject to dual jurisdictional scheme). In addition, the FCC cannot implicate the exception by simply abdicating its statutory responsibility and refusing to engage in the jurisdictional separations process. *Smith v. Illinois, supra*, 282 U.S. at 148-149; *Crockett Telephone Co. v. FCC, supra*, 963 F.2d at 1571.

The FCC's argument that jurisdiction must be found to repose in the FCC in order to expedite appellate review and hence the finality of agency determinations (FCC Brief, at 40) must be rejected because it asks the Court to *legislate*. Congress chose to give the States responsibility to make the initial determination of pricing and related matters, with appellate review through the Federal court system, in order to accord at least some degree of respect to local and regional differences in markets and competitive conditions and the ability of State regulators to address those differences. As in *Louisiana*, it is not for the FCC or this Court to effectuate a legislative approach which Congress consciously rejected.

Nor does the Act permit the FCC to dictate to the States nationwide policies and rules governing a LEC's provision of intraLATA dialing parity to competing service providers.[14] This brief addresses intraLATA dialing parity, rather than

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[14] If the Court concludes that the Act grants the States *express* authority over pricing and related matters, as found by the Eighth Circuit, then dialing parity, with its unique factual setting, will be the *only* jurisdictional issue which requires the Court to address a § 2(b) analysis.

intrastate dialing parity, for three reasons: (1) the establishment of dialing parity requirements for the *interLATA*, or *long distance*, market occurred more than a decade ago with the imposition of the "1 plus" presubscription methodology under the supervision of the MFJ court, the FCC and the States, and is therefore irrelevant to the issue before the Court, (2) since virtually all intraLATA calls are intrastate calls which, under § 2(b), fall within exclusive State jurisdiction, § 2(b) leaves the matter of intraLATA dialing parity to the States, and (3) the § 251(b)(3) duty of LECs "to provide dialing parity to competing providers of telephone exchange service and telephone toll service" appears to address only intraLATA dialing parity, in part because the BOCs, which provide the overwhelming majority of LEC service nationally, are not yet permitted to compete in the interLATA, or long distance, market.

In enacting the 1996 Act, Congress expressed no clear intent to preclude § 2(b)'s applicability to the dialing parity duty placed on carriers by § 251(b)(3). Indeed, as noted, the FCC has conceded that § 251 does not contain "an explicit grant of intrastate authority to the Commission." *First Report and Order*, ¶ 84, J.A. 448. Hence the dual jurisdictional scheme remains intact with respect to § 251(b)(3). Moreover, both the legislative history of the 1996 Act and the savings clause of § 601(c)(1) make manifest that Congress intended § 2(b) to apply to dialing parity and related matters. Accordingly, the States, not the FCC, have jurisdiction over intraLATA dialing parity.

Other provisions of the 1996 Act also demonstrate that the FCC exceeded its authority in purporting to adopt standards and rules governing intrastate and intraLATA dialing parity. Several subdivisions of § 251 – §§ 251(b)(2) and

251(e)(1), App. A5, A8-A9 – expressly grant the FCC *authority* over number portability and numbering administration, but § 251(b)(3), App. A5, which involves dialing parity, contains no such affirmative grant of jurisdiction. Moreover, § 251(e)(2), App. A9, grants the FCC authority over cost recovery relating to number portability and numbering administration, but contains no such affirmative grant of jurisdiction with respect to dialing parity cost recovery.

In addition, Congress directly addressed "intraLATA toll dialing parity" in § 271(e)(2)(B), App. A12-A13, twice referring to *State* authority to implement such dialing parity. And in the "competitive checklist" for BOCs seeking to provide interLATA service, Congress characterized number portability, but not dialing parity, as a matter on which the FCC "issues regulations pursuant to section 251." 47 U.S.C. §§ 271(c)(2)(B)(xi), 271(c)(2)(B)(xii), App. A12. Finally, the FCC's heavy reliance on § 251(g), App. A9, is apparently abandoned in this Court. By the FCC's own admission, § 251(g) is inapplicable to the dialing parity requirements imposed by § 251(b)(3). *Second Report and Order*, ¶ 29, J.A. 1178.

ARGUMENT

I. THE FIRST REPORT AND ORDER MUST BE VACATED BECAUSE THE 1996 ACT EXPRESSLY GRANTS THE STATES' EXCLUSIVE AUTHORITY OVER THE PRICING OF ACCESS TO AN INCUMBENT LOCAL EXCHANGE CARRIER'S NETWORK

The Eighth Circuit correctly determined that Congress straightforwardly and unambiguously assigned to the States exclusive authority, subject only to the standards contained in

the Act itself, to determine the prices and pricing methodologies, and the other terms and conditions, under which an incumbent LEC must provide a competing LEC with access to the incumbent LEC's local network. For example, § 252(d), entitled "Pricing standards," provides that "[d]eterminations *by a State commission* of the just and reasonable rate for the interconnection of facilities and . . . for network elements . . . shall be . . . based on the cost . . . of providing the interconnection or network element . . . " 47 U.S.C. § 252(d)(1), App. A10 (emphasis added). Similarly, § 252(c)(2) provides: "In resolving by arbitration . . . any open issues . . . , *a State commission* shall . . . establish any rates for interconnection, services, or network elements . . . " (emphasis added). And § 252(d)(3), App. A11, provides that "*a State commission* shall determine wholesale rates on the basis of retail rates . . . " (emphasis added). These provisions manifestly confer exclusive pricing authority on the States, not the FCC.

The FCC nevertheless argues that Congress gave it the authority to prescribe pricing methodologies, and other terms and conditions of local competition, to the States by providing in § 251(d)(1) that "[w]ithin 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." App. A10. The flawed assumption upon which this argument rests is that Congress' requiring the FCC to "establish regulations to implement the requirements of this section" is an unambiguous grant of jurisdiction to the FCC over all matters comprehended in § 251. To the contrary, in view of the numerous matters addressed in § 251 but expressly assigned to the States by § 252 and other provisions of the Act, § 251(d)(1) is properly read as merely requiring the FCC

to assure that there are no gaps in the procedural rules for implementation of the Act, not to dictate substantive methodologies which render a State's statutorily-assigned pricing determinations largely ministerial. The reading suggested by the FCC would allow it to usurp the States' clear authority to determine whether rates are "based on . . . cost," "just and reasonable" and based on "retail rates." 47 U.S.C. §§ 252(d)(1), 252(d)(3), App. A10, A11. Contrary to the FCC's argument, § 251(d)(1) does not authorize the FCC to override the substantive determinations which the Act otherwise expressly assigns to the States.

Nor do §§ 251(d)(2) and 251(d)(3), App. A8, aid the FCC. Section 251(d)(2) merely clarifies that the FCC has authority to determine, at least in part, "what network elements should be made available" pursuant to § 251(c)(3) – a matter no one has disputed. And § 251(d)(3), by its terms, is intended to *preserve* State access regulations, not preempt them. While the language of § 251(d)(3)(C), App. A8, may suggest some narrow FCC authority to preclude enforcement of a particular State commission regulation which "substantially prevent[s] implementation of the requirements of this section *and* the purposes of this part," it hardly authorizes the FCC to override substantive determinations which the Act expressly assigns to State commissions. Moreover, § 251(d)(3)(B), App. A8, suggests that State determinations under 251 are to be "consistent with the requirements of this section," not the pronouncements of the FCC.[15]

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[15] Nor do the other provisions on which the FCC relies for a grant of intrastate jurisdiction – 47 U.S.C. §§ 154(i), 201(b) and 303(r) – support its argument. Reliance on these provisions is largely undermined by the FCC's acknowledgments that §§ 251 and 252 "do not contain an explicit grant of

As the 1996 Act gives the States unambiguous authority to establish the "just and reasonable" prices "based on . . . cost" and "wholesale rates" based on "retail rates" under which an incumbent LEC provides a competing LEC with access to its network, subject only to the pricing standards articulated in the Act itself, the FCC's pricing regulations are *ultra vires* and were properly vacated by the Eighth Circuit.

II. THE FIRST REPORT AND ORDER MUST BE VACATED BECAUSE THE 1996 ACT PRESERVED THE DUAL JURISDICTIONAL SCHEME

The Court, however, need not reach the foregoing argument to resolve these cases in favor of the States. Under the familiar dual jurisdictional framework established by § 2(b) of the Act, and reaffirmed by the Court in *Louisiana*, the FCC's attempt to regulate the intrastate component of pricing and related matters is plainly beyond its statutory authority.

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intrastate authority" and that "sections 251 and 252 do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions." *First Report and Order*, 70, 84; J.A. 440, 448; footnote omitted. Beyond this, § 154(i) merely authorizes FCC actions "not inconsistent with this chapter." Section 201(b) relates back to § 201(a) which by its terms is limited to "interstate or foreign communication by wire or radio." And § 303(r) authorizes rulemaking "not inconsistent with law, as may be necessary to carry out the provisions of this chapter." None of these provisions provides the "unambiguous" and "straightforward" grant of authority over intrastate matters required by *Louisiana*, 476 U.S. at 377, and each of them is subject to the limitation on FCC jurisdiction over intrastate matters engendered in § 2(b), 47 U.S.C. § 152(b). *Id.*

A. The Principle of Chevron Deference is Inapplicable to this Case

Contrary to the assertions in the FCC's brief (at pp. 17, 42), the principle of *Chevron* deference[16] is inapplicable to this case. If the States are correct that the 1996 Act *expressly* grants them exclusive jurisdiction over pricing and related matters, *see* Argument I, *supra*, or if the FCC is correct that the Act *expressly* grants *it* exclusive jurisdiction over such matters, then the principle of *Chevron* deference is inapplicable because "the intent of Congress is clear." *Chevron*, 467 U.S. at 842.

If, however, the Court concludes that the 1996 Act does not *expressly* grant exclusive jurisdiction over pricing and related matters either to the States or to the FCC, *Chevron* is still inapplicable. That is so because Congress included in the Act two mandatory rules of statutory construction, both applicable to the jurisdictional questions here, which supersede the judge-made principle of *Chevron* in the circumstances presented. First, in § 2(b) of the 1934 Act, as amended, 47 U.S.C. § 152(b), Congress stated that "*nothing* in this chapter *shall be construed* to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." Emphasis added. Under § 2(b), no statutory provision cited by the FCC can be found to give the FCC jurisdiction over intrastate matters unless that provision contains an *express* grant of authority over intrastate matters to the FCC. *Louisiana*, *supra*, 476 U.S. at 377.

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[16] *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

Congress intentionally retained § 2(b) in the 1996 Act and made it applicable to §§ 251 and 252. Early drafts of the Act expressly excepted Title II (including §§ 251 and 252) from the coverage of § 2(b) but the final version of the Act omitted the exception. *First Report and Order*, ¶¶ 80, 94, J.A. 446, 452. As this Court stated in *Russello*, *supra*, 464 U.S. at 23-24: "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." Section 2(b) is a legislatively prescribed rule of statutory construction which displaces the judge-made rule of deference articulated in *Chevron*. *See Louisiana*, *supra*, 476 U.S. at 377.

Congress further reinforced § 2(b) and the dual jurisdictional scheme by enacting the rule of statutory construction contained in the savings provision of § 601(c)(1) of the 1996 Act, Pub. L. 104-104, Title VI, § 601(c)(1), 110 Stat. 143 (Feb. 8, 1996) (enacted but not codified), App. A14. Section 601(c)(1) commands that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." This provision, which clarifies that neither § 2(b) nor any provision of State law is altered by the Act unless the Act does so *expressly*, constitutes another legislatively prescribed rule of statutory construction which displaces the rule of *Chevron*.

Otherwise stated, the Act itself precludes as "impermissible" under *Chevron* any construction of its text which is inconsistent with the mandatory rules of statutory construction it contains. Because the Act requires that a grant of authority to the FCC over intrastate matters be made "expressly," any claim of authority which fails to meet the "express" standard must be rejected. That was precisely the

situation in *Louisiana*, 476 U.S. at 374-375, where *Chevron* deference was *not* accorded to the FCC.

Beyond this, where a dual jurisdictional scheme is involved, *Chevron* deference is inappropriate because the agency receiving the deference may use it to upset the statutory balance established by Congress. *See, e.g., Northwest Central Pipeline Corp. v. Kansas Corp. Comm'n*, 489 U.S. 493, 512, 515-516 n. 12 (1989); *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1246-1248 (D.C. Cir. 1996), *cert. denied sub nom. Indicated Expansion Shippers v. FERC*, 117 S. Ct. 1568 (1997); *Clark v. Alexander*, 85 F.3d 146, 152 (4th Cir. 1996); *but see Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380-381 (1988) (Scalia, J., concurring in the judgment) (suggesting that *Chevron* deference should extend to an agency's determination of the scope of its own authority). Stated another way, by retaining § 2(b) in the Act, Congress legislatively determined that *Chevron* deference should not be accorded to an FCC determination expanding the agency's authority into the intrastate realm which Congress reserved to the States.

B. Section 2(b) Prohibits the FCC From Adopting Standards and Rules Governing Intrastate Pricing and Related Matters

The plain language of § 2(b) and the principles of *Louisiana* compel the conclusion that the FCC's regulation of matters pertaining to the intrastate component of interconnection, unbundled element and resale pricing is beyond its statutory authority. Section 2(b) provides that "nothing in this Act shall be construed to apply or to give the [FCC] jurisdiction with

respect to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." In characterizing § 2(b), the Court has said: "By its terms, this provision fences off from FCC reach or regulation intrastate matters – indeed, including matters 'in connection with' intrastate service. Moreover, the language with which it does so is certainly as sweeping as the wording of the provision declaring the purposes of the Act and the role of the FCC." *Louisiana, supra,* 476 U.S. at 370. In addition, the rule of construction established by § 2(b) makes clear that every other provision of the Act which is susceptible of construction, including the provisions added by the 1996 Act, must be construed to find State authority over intrastate matters. *Louisiana, supra,* 476 U.S. at 373.

The FCC properly concedes that § 2(b) remains effective as to all matters falling outside §§ 251 and 252 of the 1996 Act. *First Report and Order,* ¶ 70, J.A. 440. The FCC nonetheless concludes that "section 251 authorizes the FCC to establish regulations regarding both interstate and intrastate aspects of interconnection, services, and access to unbundled elements" and that "the regulations the Commission establishes pursuant to section 251 are binding upon states and carriers and section 2(b) does not limit the Commission's authority to establish regulations governing intrastate matters pursuant to section 251." *Id.,* ¶ 84, J.A. 448.

However, the FCC's arrogating to itself the authority to dictate standards, methodologies and rules for intrastate pricing is refuted by the Act itself. The FCC concedes as much when it acknowledges that §§ 251 and 252 "do not contain an explicit grant of intrastate authority to the Commission." *First Report and Order,* ¶ 84, J.A. 448. The absence of such an

explicit grant of authority is fatal to its claim, for if *Louisiana* means anything, it means that Congress' intent to preempt state regulation of intrastate matters must be clear. *Louisiana, supra,* 476 U.S. at 368-69, 377; *see also Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), and many cases there cited. As no such clear expression appears here, the FCC's determinations with respect to intrastate pricing must be vacated.

In *Louisiana*, the FCC had concluded that State regulation of depreciation charges for local ratemaking purposes was thwarting Federal objectives and thus imperiling the economic well-being of the telecommunications industry. The FCC claimed that deference to the States was inappropriate where an important Federal policy, that of nurturing competition, was at stake. The FCC therefore established its own depreciation rules and declared that the States were required to follow those rules in setting intrastate depreciation rates. The Court, in the introduction to its decision rejecting the FCC's claim, stated: "[W]e do not assess the wisdom of the asserted federal policy of encouraging competition within the telecommunications industry. Nor do [w]e consider whether the FCC should have the authority to enforce, as it sees fit, practices which it believes would best effectuate this purpose. Important as these issues may be, our task is simply to determine where Congress *has* placed the responsibility. . . . " 476 U.S. at 359 (emphasis in original). The same inquiry is applicable here.

The Court in *Louisiana* went on to reject the FCC's unduly narrow construction of § 2(b). The Court stated: "[G]iven the breadth of the language of section 152(b), and the fact that it contains not only a substantive jurisdiction limitation of the FCC's power, but also a rule of statutory

construction . . . , we decline to accept the narrow view urged by respondents, and hold instead that it denied the FCC the power to preempt state regulation of depreciation for intrastate ratemaking purposes." *Id.* at 372-373. Here, as in *Louisiana*, the FCC has overridden an express Congressional limitation on its power.[17]

The legislative history of the 1996 Act also supports this view. Early drafts of the 1996 Act would have expressly excepted Part II of Title II and thus §§ 251 and 252 from the applicability of § 2(b), but the final version of the 1996 Act omitted that express exception to § 2(b). *First Report and Order*, ¶¶ 80, 94, J.A. 446, 452. The only reasonable inference to be drawn is that, apart from the narrow areas where it expressly provided to the contrary, Congress consciously chose to leave §§ 251 and 252 subject to § 2(b). As explained by the Court in *Russello, supra*, 464 U.S. at 23-24: "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."

Mead Corp. v. Tilley, 490 U.S. 714, 723 (1989), relied on by the FCC, is not to the contrary. There the Court chose not to "attach decisive significance to the unexplained disappearance of one word from an unenacted bill because 'mute

[17] In cases following *Louisiana*, the FCC and the courts have reached the same conclusion. Thus in *California v. FCC*, 905 F.2d 1217, 1239 (9th Cir. 1990), "[t]he FCC concede[d] that § 2(b)(1) reserves to the States the sole authority to regulate intrastate basic telephone service." Similarly, in *NARUC v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989), the court of appeals stated that "the *only* limit that this Court has recognized on a state's authority over intrastate telephone service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication" (emphasis in original).

intermediate legislative maneuvers' are not reliable indicators of congressional intent." *First Report and Order*, ¶ 95 n. 155, J.A. 452. Here, however, the Joint Conference affirmatively removed from the legislation a significant exception to a broad, repeatedly litigated and universally understood reservation of State authority that has existed under the statute for more than 60 years and under federal common law for nearly a century. Under these circumstances, it is nonsensical to suppose that the omission of the exception was unintentional.

Moreover, in addition to § 2(b), Congress left intact the jurisdictional separations requirements and procedures of 47 U.S.C. §§ 221(c) and 410(c), App. A3-A4, A13, to permit dual ratemaking, thereby further demonstrating its intent that the dual jurisdictional scheme for regulating "charges, classifications, practices, services, facilities, or regulations" be applicable to the amended statute. *See Louisiana*, *supra*, 476 U.S. at 375-376. There can be little doubt that the statutory phrase "charges, classifications, practices, services, facilities, or regulations" includes the pricing and pricing methodologies for access, unbundled network elements, resale and the like. In *Louisiana*, the FCC's narrowing construction of the phrase was emphatically rejected by the Court. 476 U.S. at 372-73.[18] Indeed, the Court in *Louisiana* made clear that the broad statutory language could not be read to simply "forb[id] the FCC to establish specific rates for certain intrastate services." *Id.* at 373. "[H]ad this been the intention, it would hardly have been necessary to deny the FCC the

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[18] Indeed, the FCC's dissection of pricing into methodology (over which the FCC has authority) and rates and charges between carriers (over which the States have authority) finds no textual support in the Act and the FCC points to none.

jurisdiction over 'charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service. . . . ' " *Id.*

Finally, § 601(c)(1) of the 1996 Act, App. A14, clarifies that neither § 2(b) nor any provision of State law is altered or overridden by the Act unless the Act does so *expressly*. In sum, § 2(b) of the 1934 Act, as amended, precludes the FCC's assertion and exercise of authority over intrastate pricing and related matters without an *express* grant of jurisdiction over such matters.

In this connection, the FCC criticizes the court of appeals' determination of Congressional intent because the court of appeals considered, among other things, whether particular provisions of the 1996 Act make "mention" of the FCC. FCC Brief, at 12, 13, 15, 18, 38. Contrary to the FCC's argument, however, the court of appeals, having been charged with the duty of ascertaining whether FCC authority over intrastate matters was *express*, was perfectly justified in giving significance to the fact that certain provisions of the Act did not reference the FCC when other provisions of the Act clearly did so. Express reference to the FCC in a statutory provision is a legitimate factor to be taken into consideration in determining whether Congress expressly granted jurisdiction to the FCC.

The FCC also presses a strained and implausible construction of § 2(b) itself. It cites the portion of the statute which creates two separate limitations – separated by the disjunctive word "or" – on the manner in which the Act may be construed: " 'nothing in this [chapter] shall be construed to apply *or* to give the Commission jurisdiction with respect to' intrastate matters." FCC Brief, at 34; emphasis in original. It

then argues that the section "cannot logically be construed to mean that [it] limits the scope of the Commission's authority *more* than it limits the substantive reach of federal telecommunications law." *Id.*

This argument is patently without merit for at least three reasons. First, it is contrary to the plain language of § 2(b), which compels the conclusion that these two distinct limitations on the manner in which the statute may be construed should be treated separately. That is particularly so when the construction advocated by the FCC is flatly inconsistent with the purpose of § 2(b) as articulated by this Court – to "fence off from FCC reach or regulation intrastate matters – indeed, including matters 'in connection with' intrastate service." *Louisiana, supra*, 476 U.S. at 370.

Second, in addressing the use of the disjunctive in statutory drafting, the Court has often invoked the rule that "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 229 (1993), *quoting Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Third, the FCC's suggestion that the scope of the Act and the scope of FCC jurisdiction must be treated as equivalent terms runs afoul of the well established canon that a statute should not be construed to render a portion of its text mere surplusage. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955).

The FCC nevertheless argues that "[s]ection 2(b) refers to the Commission's authority as well as to the applicability

of federal law . . . because Congress intended to bar the Commission from exercising its 'ancillary' jurisdiction . . . over intrastate matters . . . to which the Act itself does not clearly extend." FCC Brief, at 34, *citing Louisiana* and *Houston, E. & W. Texas Ry. v. United States*, 234 U.S. 342 (1914) (*Shreveport Rate Case*). This revisionist theory of the meaning of *Louisiana* is at best implausible. *Louisiana* nowhere refers to ancillary jurisdiction in broadly concluding that the purpose of § 2(b) was to "fence off from FCC reach or regulation intrastate matters." 476 U.S. at 370. Indeed, in *Louisiana* the Court pointed out that "the language with which it does so is certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC." *Id.* Moreover, it rejects the applicability of the *Shreveport Rate Case*, concluding that the breadth of the language in § 2(b) refutes the argument that the section is subject to a narrowing construction because one Congressional purpose in enacting § 2(b) was to legislatively overrule *Shreveport*. *Id.* at 372-373.

Furthermore, the FCC cites no persuasive authority suggesting that in affirmatively choosing to eliminate the statutory language excepting Title II from § 2(b), Congress effectively performed an idle act because § 2(b) had no applicability to Title II in any event. The gravamen of the FCC's argument is that it is only intrastate matters *not covered by the Act* that § 2(b) precludes the FCC from regulating. However, there is simply no evidence at all that Congress had that view when it enacted the 1996 Act. Indeed, Congress' retention of § 2(b) and the broad construction of that section in *Louisiana*, of which Congress must be presumed to have been aware, are strong indicators to the contrary. Finally, the FCC's argument would create a slippery slope: if there is

nothing addressed by the 1996 Act that is not subject to the FCC's exclusive superintendence, then the States would be left without any role whatsoever in the transition to local competition. Clearly, this was not Congress' intention.

The FCC also argues that the so-called "impossibility" exception to § 2(b), *see Louisiana*, 476 U.S. at 375-376 n. 4, precludes the applicability of § 2(b) to the local competition provisions of the Act. This argument is similarly without merit. Not only was it *not* a stated basis for the FCC's decisions below, *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1943); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962), but it is flatly refuted by the FCC's *ONA Reconsideration Order*, 5 FCC Rcd 3084 (1990), *reversed on other grounds sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993), in which the FCC required, and the Ninth Circuit upheld, dual Federal/State tariffing of basic network elements, the very sort of unbundled network elements at issue in this case. 4 F.3d at 1513, 1515. Indeed, as noted by the court of appeals below, ratemaking is inherently severable. Pet. App. 20a. This Court has of course agreed. *Louisiana*, 476 U.S. at 375.

Finally, the FCC's impossibility claim ignores that the exception to § 2(b) is "a limited one." *California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990). Where such a claim is properly asserted, the FCC bears the burden, plainly not satisfied here, "of justifying its *entire* preemption order by demonstrating that the order is narrowly tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals." *Id.* (emphasis in original); *accord*, *California v. FCC*, 75 F.3d 1350, 1359 (9th Cir.), *cert. denied*, 116 S. Ct. 1841 (1996) (FCC bears burden of demonstrating negation); *NARUC v. FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989) ("The

FCC has the burden . . . of showing with some specificity that [State regulation] . . . would negate the federal policy. . . . "). Finally, the FCC cannot implicate the exception by simply abdicating its statutory responsibility and refusing to engage in the jurisdictional separations process. *Smith v. Illinois*, *supra*, 282 U.S. at 148-149 (some form of jurisdictional separations mandatory); *Crockett Telephone Co. v. FCC*, *supra*, 963 F.2d at 1571 (same).

Indeed, in a number of similar contexts, the FCC has held that the dual jurisdictional scheme applies to the prices or rates charged by LECs for "access," "unbundled access" and "interconnection" to the local network. For example, in the Access Charge case, *MTS & WATS Market Structure: Third Report and Order*, 93 F.C.C.2d 241, 260-265 (1983), *affirmed on other grounds*, *NARUC v. FCC*, *supra*, 737 F.2d 1095, the FCC acknowledged the long-standing practice of imposing state-approved access charges upon competing long distance carriers for use of the LEC's intrastate network. Moreover, on appeal, the court of appeals, while affirming the FCC's setting interstate access charges for use of local plant applicable to interstate service, endorsed the imposition by States of intrastate access charges for the use of local plant applicable to intrastate service. *See* 737 F.2d at 1114, 1115. Notably, such intrastate access charges are imposed upon competing long distance carriers, not on end use customers.

Similarly, in the *ONA Reconsideration Order*, *supra*, 5 FCC Rcd at 3088-3090, 3100 n. 111, the FCC required that LECs file tariffs with the FCC offering unbundled basic service elements ("BSEs") for access to the *interstate* network and that they similarly file tariffs with the relevant State commission offering unbundled BSEs for access to the *intrastate* network. On appeal, in concluding that the FCC's

approach was fully consistent with the statutory scheme, the court of appeals said: "The ONA orders clearly establish a dual federal and state tariffing structure for BSEs, and the states will retain authority to set rates for those BSEs which are used for intrastate service. This system complies with the Supreme Court's decision in *Louisiana* that the Communications Act is designed to establish a dual regulatory scheme." *California v. FCC*, *supra*, 4 F.3d at 1515. Once tariffed, BSEs were then offered to competitive enhanced service providers – not end users – who in turn provided enhanced services utilizing the BSEs to end use customers. If the intrastate component of these charges for providing unbundled network elements to competitive service providers was properly subject to State jurisdiction, as the FCC conceded in the ONA Tariffing case, then the intrastate component of the interconnection, access and unbundled network element charges imposed upon competitive local telephone service providers here is similarly subject to State jurisdiction.

The same is true with respect to "interconnection" charges. In *In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 2 FCC Rcd 2910 (1987), which involved the terms and conditions under which cellular service providers would be permitted to interconnect with the local network, the FCC stated that "[t]he charges for interconnection . . . are severable between the jurisdictions because the underlying costs of interconnection are segregable. Charges for switching of interconnected calls are also subject to dual jurisdiction." *Id.* at 2911, ¶ 12.

The FCC nevertheless argues that Congress could not have intended to accord State commissions jurisdiction over

pricing and other aspects of local competition because without FCC jurisdiction, final resolution of issues under the Act would not occur for many years, "after the various pricing and other issues have wound their way through 50 state commissions, numerous federal district courts, various courts of appeal, and ultimately this Court, all without comprehensive direction from the federal agency with the expertise to interpret federal communications law." FCC Brief, at 40. The short answer to this exaggerated policy argument is that it asks the Court to *legislate*.

Contrary to the FCC's argument, Congress knew how to establish a system of appellate review which would maximize and expedite uniformity, certainty and finality if that was its predominant goal. *See, e.g.*, 15 U.S.C. § 29(b) (providing for direct appeal from a district court to this Court under certain circumstances). Instead, Congress chose the States to make the initial determination of pricing and related matters, with appellate review of State commission system in the Federal courts, in order to accord at least some degree of respect, deference and comity to local and regional differences in markets and competitive conditions and the ability of State regulators to address those differences.

It is beyond the role of the FCC and of this Court to effectuate a legislative approach which Congress consciously rejected. As in *Louisiana*, the Court should not "grant the agency power to override Congress." 476 U.S. at 374-375.

III. THE SECOND REPORT AND ORDER MUST BE VACATED BECAUSE THE 1996 ACT GRANTS THE STATES EXCLUSIVE AUTHORITY OVER INTRA-LATA DIALING PARITY

A. Section 2(b) Prohibits the FCC From Adopting Standards and Rules Governing Intrastate and Intra-LATA Dialing Parity and Related Cost Recovery

Under § 2(b), the States possess exclusive jurisdiction over intrastate dialing parity.[19] California's brief addresses *intraLATA*, rather than *intrastate*, dialing parity for three reasons. First, dialing parity requirements for the *interLATA*, or *long distance*, market occurred more than a decade ago with the imposition of the "1 plus" presubscription methodology under the supervision of the MFJ court, the FCC and the States.[20] Dialing parity to facilitate interLATA competition is thus irrelevant to the issue before the Court.

Second, virtually all intraLATA telephone calls initiated in the United States are intrastate in nature. Thus virtually all intraLATA calls fall on the State side of the jurisdictional fence erected by § 2(b). Since this case is about intraLATA

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[19] In making its § 2(b) argument regarding dialing parity, California relies on all points raised in Argument II, *supra*, and, to minimize repetition, primarily addresses in Argument III the factual and analytical differences between the pricing and dialing parity arguments predicated on § 2(b). If the Court concludes that the 1996 Act grants the States express authority over pricing, as did the Eighth Circuit, then dialing parity with its unique factual setting, will perhaps be the *only* jurisdictional issue which requires the Court to address the § 2(b) analysis set forth in Arguments II and III.

[20] At the time, dialing parity requirements for intrastate long distance service were placed in intrastate access tariffs under the supervision and authority of the State commissions, while dialing parity requirements for interstate long distance service were placed in interstate access tariffs under the supervision and authority of the FCC.

dialing parity (interLATA dialing parity having been addressed long ago), and since virtually all intraLATA calls are intrastate calls which, under § 2(b), fall within exclusive State jurisdiction, it is obvious that § 2(b) leaves the matter of intraLATA dialing parity to the States.

Third, the duty of LECs "to provide dialing parity to competing providers of telephone exchange service and telephone toll service" under § 251(b)(3), App. A5, appears to address only intraLATA dialing parity. The BOCs, which provide the overwhelming majority of LEC service nationally, are not yet permitted to compete in the interLATA, or long distance, market. *See* § 271 of the Act, 47 U.S.C. § 271. Moreover, § 251(b)(3) places a duty on LECs to provide dialing parity to *their own* competitors – competitors in the intraLATA market – not to the interexchange carriers that compete with AT&T and others in the interLATA market.

This construction of § 251(b)(3) is supported by the section's legislative history. The Joint Explanatory Statement of the Committee of Conference notes at p. 5 that in the Senate bill, "[n]umber portability and *local* dialing parity are included in the minimum standards of subsection 251(b)" (emphasis added). Similarly, the House amendment provision set out "the specific requirements . . . that apply to LECs *as competitors enter the local market*," *id.*, at 7 (emphasis added). Finally, the conference agreement established § 251(b)(3) as ultimately signed into law, with the conferees noting that "the duties imposed under section new 251(b) make sense only in the context of a specific request from another telecommunications carrier or any other person *who actually seeks to connect with or provide services using the LEC's network*," *id.*, at 8 (emphasis added).

It is therefore entirely reasonable to conclude that Congress intended that the dialing parity requirement of § 251(b)(3) be fashioned and implemented by the States, subject only to the express requirements of the Act. Section 2(b), which after much Congressional debate was intentionally left intact by the 1996 Act, mandates that "*nothing* in this chapter" – including § 251(b)(3) – "shall be construed to apply or to give the [FCC] jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier" (emphasis added). The broad statutory phrase, "charges, classifications, practices, services, facilities, or regulations," plainly includes the provision of dialing parity. *Louisiana*, 476 U.S. at 372-373.

The FCC nevertheless concluded in the *Second Report and Order* that it possessed statutory authority to adopt nationwide standards governing intraLATA dialing parity. It said: "We conclude that the purpose of the statutory dialing parity requirements – to facilitate the introduction of competition in the local and toll markets – is best served by the adoption of broad guidelines and minimum federal standards that build upon the states' experiences. . . . [S]uch minimum nationwide standards will facilitate competition to the extent the new entrants seeking to offer regional or national services will not be subjected to an array of differing state standards or timetables. . . . [U]niform standards – in some cases minimum, uniform standards – will speed competitive entry by more promptly opening the local and toll markets to competition." *Second Report and Order*, ¶ 25, J.A. 1176; footnotes omitted.

The FCC's arrogating to itself the authority to dictate standards, policies and rules for intraLATA dialing parity is

refuted by FCC's concession that §§ 251 and 252 "do not contain an explicit grant of intrastate authority to the Commission." *First Report and Order*, ¶ 84, J.A. 448. As above noted, *Louisiana* and the cases following it teach that the absence of such an explicit grant of authority precludes preemption. *Louisiana*, *supra*, 476 U.S. at 368-69, 377. *See also NPRM, Administration of the North American Numbering Plan*, *supra*, 9 FCC Rcd at 2077 n. 93 (in which the FCC stated in connection with dialing parity that most intraLATA toll calls "are intrastate and not within our purview"). As no such clear expression appears here, the principle of *Louisiana* controls and the jurisdictional conclusions in the *Second Report and Order* with respect to intrastate dialing parity must be vacated.

The legislative history of the 1996 Act also supports this view. Congress' choosing to omit from the statute the provision that would have expressly excepted Part II of Title II and thus §§ 251 and 252 from the applicability of § 2(b) strongly supports the conclusion that Congress consciously chose to leave § 251(b)(3) subject to § 2(b).

There can be little doubt that the statutory phrase "charges, classifications, practices, services, facilities, or regulations" includes dialing parity. In *Louisiana*, the FCC's narrow construction of the phrase was emphatically rejected by the Court. 476 U.S. at 372-73. Indeed, the Court in *Louisiana* made clear that the broad statutory language could not be read to simply "forb[id] the FCC to establish specific rates for certain intrastate services." *Id.* at 373. "[H]ad this been the intention, it would hardly have been necessary to deny the FCC the jurisdiction over 'charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service. . . . ' " *Id.* The FCC's

similarly narrow construction of these words here, so as to exclude "practices" and "regulations" seeking to ensure a customer's ability to complete intrastate and intraLATA toll calls through a chosen competitive service provider without having to dial extra digits, must also be rejected.

Nor is there an "impossibility" or "inseverability" issue with respect to dialing parity requirements, even though dialing parity does not involve rates. Again, the FCC did not rely on the impossibility exception in the *Second Report and Order*. Moreover, the *Second Report and Order*, at ¶ 37, J.A. 1183, itself acknowledges that dialing parity rules can be separated into interLATA and intraLATA components, or interstate and intrastate components, at the discretion of the relevant State commission. It states: "[W]e have also concluded that each state should have the opportunity to determine whether customers should be able to presubscribe to carriers for intrastate toll service and for interstate toll service in lieu of the intraLATA and interLATA toll presubscription dichotomy that we have established. . . . We thus conclude that states . . . should have the flexibility to require that toll dialing parity implementation be based on state boundaries where they determine that implementing toll dialing parity on the basis of state boundaries would be pro-competitive and otherwise in the public interest." *Id.*

In addition, the FCC's interest in imposing dialing parity rules which would apply to intraLATA calls which are 99.8 per cent intrastate in nature (100 per cent in California) is obviously *de minimis*. In other contexts, the FCC has held that the Federal interest in regulating service which involves less than ten per cent interstate traffic is *de minimis*. *Decision and Order, In the Matter of MTS and WATS Market Structure*, 4

FCC Rcd 5660 (1989), at ¶ 2, *adopting Recommended Decision and Order, In the Matter of MTS and WATS Market Structure*, 4 FCC Rcd 1352 (1989).

In sum, § 2(b) precludes the FCC's assertion and exercise of authority over intraLATA dialing parity.

B. Other Provisions of the 1996 Act Support the Conclusion That the FCC Has Exceeded Its Statutory Authority in Adopting Standards and Rules Governing Intrastate and IntraLATA Dialing Parity and Related Cost Recovery

Other provisions of the 1996 Act support California's argument. Several subdivisions of § 251 *do* grant the FCC authority over limited substantive areas addressed by the section, while § 251(b)(3), App. A5, addressing dialing parity, does not. For example, in § 251 Congress gave the FCC authority to prescribe requirements for "number portability" (§ 251(b)(2), App. A5) as well as "exclusive jurisdiction" over the portions of the North American Numbering Plan applicable to the United States (§ 251(e)(1), App. A8). However, the dialing parity provisions of § 251(b)(3) include no such grant of authority to the FCC. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the deliberate inclusion or exclusion." *Russello, supra*, 464 U.S. at 23.

This conclusion is reinforced by the fact that Congress gave the FCC no express authority over dialing parity cost recovery. Having expressly given the FCC jurisdiction over number portability and numbering administration in §§ 251(b)(2) and 251(e)(1), App. A5, A8, Congress carefully

clarified in § 251(e)(2), App. A9, that the FCC had *additional* jurisdiction to determine cost recovery issues relating to number portability and numbering administration. It stated: "The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis *as determined by the Commission*." 47 U.S.C. § 251(e)(2), App. A9; emphasis added. However, no such explicit grant of authority to the FCC was made with respect to cost recovery for dialing parity.[21]

In addition, Congress directly addressed "intraLATA toll dialing parity" in § 271(e)(2)(B) of the 1996 Act, App. A12-A13, twice referring to narrow requirements affecting the timing of an exercise of *state* authority to implement intra-LATA toll dialing parity. It said:

> Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a [BOC] to implement intraLATA toll dialing parity, *a State may not require* a [BOC] to implement intra-LATA toll dialing parity in that State before a [BOC] has been granted authority . . . to provide interLATA services originating in that State or before 3 years after the date of enactment of the

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[21] The FCC rests its determination that it has authority to regulate dialing parity cost recovery on the implementation timetable of § 251(d)(1) and the catch-all provision of § 4(i) of the 1934 Act, 47 U.S.C. § 154(i), which authorizes it "to take any action [it] consider[s] 'necessary and proper' to further the public interest." *Second Report and Order*, ¶ 92; J.A. 1209. However, neither of these provisions constitutes a substantive grant of jurisdiction to take action not otherwise authorized by the Act. *E.g.*, *California v. FCC*, 905 F.2d 1217, 1240-41 n. 35 (9th Cir. 1990). Moreover, those provisions are themselves subject to the limitation and rule of statutory construction of § 2(b). *Id.*

> Telecommunications Act of 1996, whichever is earlier. Nothing in this paragraph precludes *a State from issuing an order* requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

47 U.S.C. § 271(e)(2)(B), App. A12-A13; emphasis added.

Similarly, in the "competitive checklist" for BOCs seeking to provide interLATA service contained in § 271(c)(2)(B), App. A12, Congress referred to number portability, but not dialing parity, as a matter upon which the FCC "issues regulations pursuant to section 251." It set a standard for number portability applicable "[u]ntil the date by which *the Commission issues regulations pursuant to section 251 to require number portability* . . . " (*see* § 271(c)(2)(B)(xi), App. A12) but made no such reference with respect to the checklist requirement for dialing parity (*see* § 271(c)(2)(B)(xii), App. A12). The obvious inference is that Congress did not intend the FCC to issue regulations pursuant to § 251 governing dialing parity.

Finally, petitioners appear to have abandoned their heavy reliance on § 251(g) of the 1996 Act, 47 U.S.C. § 251(g), App. A9, in this Court. If they have done so, the abandonment is justified. Section 251(g) does not grant the FCC authority to regulate intraLATA dialing parity. In the first place, the FCC itself in the *Second Report and Order* correctly determined that § 251(g) has nothing to do with the intraLATA dialing parity duty of § 251(b)(3). The *Second Report and Order* states: "That section [251(g)] contains no reference or cross reference to dialing parity or to section 251(b)(3). Section 251(g) preserves the equal access obligations already imposed on the BOCs and GTE, but does not exempt them

from the toll dialing parity requirements." *Second Report and Order*, ¶ 29, J.A. 1178-1179. Thus the FCC's argument to the effect that § 251(g) grants it the authority to interpret and enforce the § 251(b)(3) dialing parity duty is nothing but an impermissible post hoc rationalization of counsel. *SEC v. Chenery Corp., supra*, 332 U.S. at 196.

Moreover, § 251(g) addresses only the obligations of the BOCs and GTE under their respective consent decrees, while § 251(b)(3) addresses the obligations of all LECs. Further, § 251(g), by its terms, involves only the provision of equal access to interexchange carriers and information services providers – parties with whom the BOCs were at one time precluded from competing by MFJ restrictions. It does not address the LECs' provision of intraLATA dialing parity to facilitate competition between the LECs and those seeking to compete with them directly in the provision of intraLATA service. That latter subject is addressed by § 251(b)(3). As all parties appear to concede, the MFJ court left to the States the question of whether there would be intraLATA competition at all, as well as the subsidiary question of the appropriate dialing parity requirements, should there be such competition. *United States v. Western Electric Co., supra*, 569 F.Supp. 990, at 1005; *United States v. Western Electric Co., supra*, 569 F.Supp. 1057, at 1109.[22]

Both § 2(b) and other provisions of the 1996 Act compel the conclusion that the Act does not authorize the FCC to regulate intraLATA dialing parity.

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[22] The legislative history of § 251(g) supports this view. *See* Joint Explanatory Statement of the Committee of Conference, at p. 9.

CONCLUSION

In the final analysis, this case is fundamentally the same as *Louisiana*. There, the FCC argued that "federal displacement of state regulation is justified under the Act when necessary 'to avoid frustration of validly adopted federal policies.' " 476 U.S. at 362, 363. In the face of this argument, the Court observed that "it goes without saying that we do not assess the wisdom of the asserted federal policy of encouraging competition within the telecommunications industry. Nor do we consider whether the FCC should have authority to enforce, as it sees fit, practices which it believes would best effectuate this purpose." *Id.* at 359. The Court then rejected the FCC's argument, stating: "As we so often admonish, only Congress can rewrite this statute." *Id.* at 376. The Court should take the same course here.

Respectfully submitted,

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APPENDIX OF STATUTES

47 U.S.C. § 152(b)(1)

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 and 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.

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47 U.S.C. § 153(15), (16), (21), (22), (25), (26), (47), (48)

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires –

(15) Dialing parity

The term "dialing parity" means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation from among 2 or more telecommunications services providers (including such local exchange carrier).

(16) Exchange access

The term "exchange access" means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

(21) InterLATA service

The term "interLATA service" means telecommunications between a point located in a local access and transport area and a point located outside such area.

(22) Interstate communication

The term "interstate communication" or "interstate transmission" means communication or transmission (A) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (B) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (C) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter (other than section 223 of this title), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

(25) Local access and transport area

The term "local access and transport area" or "LATA" means a contiguous geographic area –

(A) established before February 8, 1996, by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or

(B) established or modified by a Bell operating company after February 8, 1996, and approved by the Commission.

(26) Local exchange carrier

The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of this title, except to the extent that the Commission finds that such service should be included in the definition of such term.

(47) Telephone exchange service

The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which subscriber can originate and terminate a telecommunications service.

(48) Telephone toll service

The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

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47 U.S.C. § 221(b), (c)

(b) State jurisdiction over services

Subject to the provisions of sections 225 and 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even

though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

(c) Determination of property used in interstate toll service

For the purpose of administering this chapter as to carriers engaged in wire telephone communication, the Commission may classify the property of any such carrier used for wire telephone communications, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service. Such classification shall be made after hearing, upon notice to the carrier, the State commission (or the Governor, if the State has no State commission) of any State in which the property of said carrier is located, and such other persons as the Commission may prescribe.

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47 U.S.C. § 251(a)-(e), (g)

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty –

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and

conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty –

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether –

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications

numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competively neutral basis as determined by the Commission.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

47 U.S.C. § 252(c), (d)

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall –

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section –

(A) shall be –

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this

title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless –

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed –

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charges to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

47 U.S.C. § 271(c)(2)(B)(xi), (xii)

(B) Competitive checklist

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

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47 U.S.C. § 271(e)(2)

(2) IntraLATA toll dialing parity

(A) Provision required

A Bell operating company granted authority to provide interLATA services under subsection (d) of this section shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) Limitation

Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State before a Bell operating company has been granted

authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

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47 U.S.C. § 410(c)

The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and, except as provided in section 409 of this title, may refer any other matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board. The Joint Board shall possess the same jurisdiction, powers, duties, and obligations as a joint board established under subsection (a) of this section, and shall prepare a recommended decision for prompt review and action by the Commission. In addition, the State members of the Joint Board shall sit with the Commission en banc at any oral argument that may be scheduled in the proceeding. The Commission shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, but not vote, when it has under consideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding. The Joint Board shall be composed of three Commissioners of the Commission and of four State commissioners nominated by the national organization of the State commissions and approved by the Commission. The Chairman of the Commission, or another Commissioner designated by the Commission, shall serve as Chairman of the Joint Board.

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§ 601(c)(1), Telecommunications Act of 1996, Pub.L. 104-104, Title VI, § 601(c)(1), 110 Stat. 143 (Feb. 8, 1996)

(c) **Federal, State, and local law –**

(1) **No implied effect.** – This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.